85-1426

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1985

No. _____

COAKLEY & WILLIAMS, INC.,

Petitioner

v.

SHATTERPROOF GLASS CORPORATION,

Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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February 26, 1986

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 85-1053

Coakley and Williams, Inc., a Maryland corporation; Neil T. Coakley; Geraldine L. Coakley; Fred G. Williams; Jean Williams,

Appellants,

versus

Shatterproof Glass Corporation, a Delaware corporation,

Appellee.

and

Washington Plate Glass Co., Inc., a Washington, D.C. corporation,

Third Party Defendant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. John R. Hargrove, District Judge. (C/A HAR-81-334)

Argued: October 8, 1985
Decided: December 2, 1985

Before HALL and SPROUSE, Circuit Judges, and BUTZNER, Senior Circuit Judge.

C. Lawrence Wiser (M. Michael Cramer on brief) for Appellants' Gerald I. Katz (Mark J. Stone; Wickwire, Gavin & Gibbs, P.C. on brief) for Appellee.

HALL, Circuit Judge:

Coakley & Williams, Inc. ("Coakley"), a Maryland corporation, appeals from the order of the district court in this diversity action granting judgment on behalf of Shatterproof Glass Corporation ("Shatterproof"). Finding no error, we affirm.

This is the second appeal to this Court in this matter. A full statement of the underlying facts is provided in our earlier opinion, Coakley & Williams, Inc. v. Shatterproof Glass Corp., 706 F.2d 456 (4th Cir. 1983). Briefly, the dispute in this case arose from the construction of a building in Lanham, Maryland, in 1977. Coakley, serving as the general contractor, employed by written agreement Washington

Plate Glass ("Washington") "to furnish and install aluminum and glass curtain wall and storefront work" in the building. Washington purchased the glass from Shatterproof. When the glass proved unsatisfactory, Coakley instituted legal action against Shatterproof[1] alleging breach of implied warranties of merchantability and fitness for particular purpose pursuant to the Maryland Uniform Commercial Code ("U.C.C."), Annotated Code of Maryland, § 101 et seq.

Initially, the district court granted Shatterproof's motion for dismissal pursuant to the Federal Rules of Civil Procedure, Rule 12(b)(6). The district court agreed with Shatterproof that the applicability of the U.C.C. turned upon the nature of the contract between Washington and Coakley. Examining that contract, the court concluded that the admittedly hybrid or mixed contract was predominantly one for

service. Finding no material fact in dispute, the court ruled that the U.C.C. was inapplicable and dismissed Coakley's complaint.

On appeal, we remanded this case, holding that the determination of whether a hybrid contract is predominantly for the sale of goods and thus within the U.C.C. presents a factual question generally unsuited to resolution by summary judgment. We further concluded that a substantial factual inquiry into such elements as (1) the language of the contract, (2) the nature of the business of the supplier, and (3) the intrinsic worth of the materials involved normally could not be conducted within the context of a Rule 12(b)(6) motion.

On remand, the district court conducted, as we had directed, a thorough inquiry into the facts surrounding the Washington-Coakley contract. The court also followed

the guidance we offered in our earlier opinion and applied the leading cases on the issue of hybrid contracts under Maryland law[2] to determine whether the "predominant factor" or "thrust" of the contract at issue was toward service or goods. The district court then held that because Coakley was not a buyer of goods within the meaning of the U.C.C., it could not maintain an action for breach of warranties against Shatterproof. The court also concluded that a purchaser of services could not rely upon the abolition of buyer-seller privity contained in the amended Maryland U.C.C.[3] This appeal followed.

In the present appeal, Coakley contends that the district court erred in finding that the contract between Coakley and Washington was primarily for service and thus not governed by the U.C.C. Coakley also asserts that the district

court erred in concluding that Shatterproof was not liable under the U.C.C. as a seller of goods regardless of any contractual relationship between Washington and Coakley.[4] We disagree.

The district court's determination that the contract between Washington and Coakley was primarily for service is a factual one subject to review only under a clearly erroneous standard. Based upon our consideration of the briefs, the record, and oral argument, we find nothing erroneous in the district court's factual conclusion. Nor do we perceive any error in the court's application of the facts to the law.

We also see no merit in Coakley's contention that the district court erred in finding that the applicability of the U.C.C. turned solely on the Washington-Coakley contract. For this argument Coakley relies upon the abolition of

privity in Maryland's U.C.C. § 2-314 and the statement in our earlier opinion that "nothing should prevent Coakley from arguing that Shatterproof, clearly having supplied goods, remains subject to the U.C.C." 706 F.2d at 458 n.8. We believe that Coakley's reliance is misplaced in both instances.

Maryland's amended section 2-314 expanded the definition of "seller" but made no express change in the definition of buyer which remains defined in U.C.C. § 2-103(1)(a) as "a person who buys or contracts to buy goods." The district court had already concluded that Coakley had purchased service, not goods. Coakley offered no controlling authority below to support its contention that the U.C.C.'s clear definition of buyer had been altered. We can, therefore, see no error in the court's conclusion that the expansion of privity in section 2-314 extended no

additional rights to a purchaser of services.

Moreover, our prior statement was not a ruling on the merits of Coakley's claim. Indeed, we expressly stated that it had not figured in the disposition of the case. Id. Our previous action reinstated the controversy with all claims intact. It permitted Coakley on remand to make its argument on the effect of the abolition of privity. It did not guarantee success.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

Footnotes

[1]Washington Plate Glass had become involved in an involuntary bankruptcy proceeding. Efforts by Shatterproof to join it as a third party defendant were unavailing.

[2]The district court's bench opinion noted the applicability of Bonebrake v.

Cox, 499 F.2d 951 (8th Cir. 1974), which was expressly adopted in Maryland in Burton v. Artery, Inc., 279 Md. 94, 367 A.2d 935 (1977). The court in Bonebrake had articulated the "predominant purpose" test that we advocated in our previous opinion.

The district court also properly distinguished the only exception to the predominant purpose test in Maryland, which was stated in Anthony Pools, A Division of Anthony Industries v. Sheehan, 295 Md. 285, 455 A.2d 434 (1983). The court therein had applied U.C.C. warranties to a contract predominantly for service when the defective element (a diving board) retained its identity as consumer goods. The court in the instant case found that the glass did not retain its separate identity, a factual conclusion that we do not find erroneous.

[3]Maryland's U.C.C. § 2-314 as amended addresses the applicability of implied warranties and contains the following language:

> (a) In §§ 2-314 through 2-318 of this title, "seller" includes the manufacturer, distributor, dealer, wholesaler or other middleman or the retailer; and
>
> (b) Any previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer.

[4]Shatterproof, in response to Coakley's contention, argues that the district court properly found the U.C.C. inapplicable but that in any instance the statute of limitations had run on any claims Coakley might have. Because we

reject both of Coakley's contentions, we find it unnecessary to address the limitations issue.

OPINION OF THE DISTRICT COURT

THE COURT: Well, I think the first question you will have to deal with which certainly we have to deal, as I said, I would reserve it, but I would deal with it as soon as I reviewed my notes and also looked at the cases, the Maryland cases, and also any 4th Circuit cases or federal cases that go along with it. It is on the question of whether or not this is a contract for services.

Now, of course, the history of this case is one in which this question was dealt with, not only by another Judge of this court, but by the 4th Circuit as well. So we do have a lot of history, and although not factual history we have at least a legal history attached to this case. Now I think I have to make some findings of fact. I certainly must do that on the

question of whether or not this was a contract or service and so forth.

I have reviewed the contract and I will talk about that in a few minutes, but in determining, of course, the Court has dealt with it, the 4th Circuit has dealt with it, and everyone else has dealt with it when you are dealing with a contract for services. Now in the reversing of Judge Ramsey, Judge Ramsey's Order dismissing this case, the Court, that is Judge Murnaghan, stated very clearly that the Plaintiff should have the opportunity to offer evidence in support of their argument that this was a contract for the purchase of goods, which under those circumstances keep them within the purviews of the Uniform Commercial Code. Otherwise, certainly, by way of limitations and every other way could not be in court.

Now also that Court held, and I have to follow the mandates of that Court to

some extent, that the first thing this Court must determine is whether the contract with the Washington Plate Glass was one for sale of goods, and if so, it would therefore be governed by the Uniform Commercial Code. I don't think there is any question that that's what I have to do first and that was a part of that case.

Now the initial determination which has to be made before, I think, the question is what evidence did we have, and, I have to deal with that as I talk about the law because I think you can't separate them. Of course, you have to determine this issue before you can even get involved with the issue of merchantability and also the implied warranty of fitness and the other issue, of course, is the issue of damage.

Now I have made some notes but with the pressing of time they are not as fresh as perhaps they should be. So I am going

to have to review them as I go along so I cover everything. Now there is a dispute, and looking at the evidence, the evidence, as I view the evidence in this case, the evidence was one of Mr. Coakley from Coakley & Williams, his testimony primarily was that he was the general contractor, that although he and his wife and another gentlemen's wife owns the building, that they were a general contractor. I certainly have to find that from his testimony that they were contractors interested in having four walls put up on the building that had certainly been put up and that was the primary interest of his company as a contractor.

Now the ultimate question, though, is did he buy four walls to be put up by a glass contractor or did he buy goods to be put up by someone else, and, I think that is the issue in this case, and, I think that is whether or not this was a mixed

contract for the sale of goods and services or whether or not this was a contract exclusively for service. The appropriate test for this under Article II of the Uniform Commercial Code was articulated by the Maryland Court of Appeals in Burton vs. Artery Company, and the Court adopted the test fashioned by the 8th Circuit, that is, in Brubacker vs. Cox, in 499 F2d at 951, at page 962. That was a 1979 case, which stated that the inclusion in a mixed contract under Article II was to be determined according to the predominant factors. The predominant factors is thrust, their purpose is reasonably stated in the rendition of services with goods incidentally involved, that is, if the goods are only incidentally involved then it is a service contract. If the goods are predominant in the contract then you can have a contract for the sale of goods.

The Court of Appeals of Maryland further refined the test in the Anthony Pool case which I mentioned earlier, although I wanted to review that case to make sure I had the facts. In that case, which is at 455 Atlantic 2d 434, 295 Maryland 285, which is a 1983 case, and, probably one of the more recent cases other than this 4th Circuit case, where the Court states that:

"Under the predominant purpose test as applied by a majority of the courts, a hybrid transaction must first be classified as a sale of goods in order for the Uniform Commercial Code to apply based on implied warranties on the goods included in the transaction."

The threshold question in the Anthony Pool case was whether the contract pertaining to the construction of a swimming pool and for the sale of related equipment, I think in that case was a diving board, fell

within the scope of the Uniform Commercial Code as a contract primarily for the sale of goods. And the Court in that case, that's a Maryland Court of Appeals, in that case, and is a relatively recent case and using the predominant purpose test stated:

"Anthony undertook the construction of an inground steel reenforced gunite swimming pool with hand finished plastic surfacing, tile trim and coping and the Sheehans -- "who were the purchasers" -- were not buying steel rods or gunite or plastic or steel. The predominant factor, that is, the thrust, the purpose of the contract was the furnishing of the labor and servicing by the Anthony Pool while the sale of the diving board was incidental to the construction of the pool itself." Of course, that is what the Maryland Courts had to say about this type of a situation.

Now applying that standard to the case at hand, I think from the testimony of all

the parties, Mr. Coakley, I think Mr. Ruben, Mr. King and in considering their testimony as a whole, and, I think they were contracting for the construction of a wall for a building. I saw nothing in the contract, I saw nothing in their testimony, and I heard nothing in their testimony or in the contract that I see anything where anyone was contracting to buy glass, just a sheer glass window. I saw nothing. I think the testimony was not only clear but it was unequivocally clear by Mr. Ruben when he said that they were contracting to put up a glass wall. I think even more so when you look at his testimony as to the contract and as to the manner in which he acquired the materials and he arrived at the contract price.

Now I do not think in this case and I did not see any evidence where the Coakley & Williams Company was involved in the contract predominantly to buy glass, but,

as I said earlier, it was for the construction of glass walls. They left everything up to the Washington Plate Company. They got involved in nothing other than to make the contract where they submitted a proposal. They accepted it. They did not get involved other than to apply to, I suppose you almost cannot do it, I guess, almost by reasonable inference to have an architectural drawing which set up a building to have a frame to be covered with glass and that the glass walls were clearly a part of it.

The fact that in this case the glass had to be manufactured for the building, it was manufactured, there was no question about that, it had to be fastened to the building and it had to be sealed to the building, and all of this was testified to and is clearly in evidence in this case, all of which required substantial amounts of labor, and that was a part of the

contract. Therefore, if you use the Anthony Pool test, the Coakley-Washington Plate Glass contract was really one purely and simply for the rendition of services. I don't think you could read that contract in any way, fashion, or form, but that it was a contracting company selling its services to construct a glass wall and, incidentally, you have to use glass in a glass wall the same as you have to use bricks in the brick wall, and I don't think the brick company would have been in the same position as Shatterproof Glass if you contracted for brick or if you had aluminum walls and you had the same situation. The substantial part of this contract was a construction contract for the performance of services, that is, the services of constructing four walls on the building. Without the walls this would not have a building. There is no question about that. So without the glass certainly you probably

couldn't have had a building, but it had to be put up and made into a wall. The testimony is abundantly clear by amost all the witnesses that something more than just making the glass had to be done.

Now in the 4th Circuit's Opinion in the instant case, the Court recognized these factors, that is, Judge Murnaghan recognized these factors and he determined, and as I think we discussed earlier, which must be weighed to determine the nature of the contract. I will say first in using the 4th Circuit and I am doing this simply because this is the case we are talking about, the same case, he said the language of the contract, in nature of the business of the supplier, and the intrinsic work of the materials involved. And that is clearly the test that I am using in this test.

Now according to this standard, and the standards set out by the 4th Circuit in

this case, what I said before just tells you what Maryland is doing and what the Uniform Commercial Code has done, but using Judge Murnaghan's test, and he said you use this test but go back and produce the evidence that would make this a sale of goods and that's what he told, I think the Plaintiff. In applying and in looking at the evidence presented by the Plaintiff, the April 6th, 1973 letter contract, articulates itself as one for the furnishing and installing of aluminum and glass curtain walls and store front work on the Lanham office building and that is what that contract was for. Although the initial spandrel glass was not involved, that was the original contract and that was the intent of the parties, and that's what it was intended to be. Washington Plate Glass in 1977 was merely replacing glass as a part of the '73 contract for the defective glass. In that case I think the

evidence shows that it was a failure of the seal. So they were merely replacing the glass. That might have some bearing on the limitation question as to when the limitations began to run, but it does not have any bearing on the nature, the effect, and the understanding of the contract. It was clearly a contract to install four walls on the building and to install it in the most workmanlike manner in which a company could do it. If that were not the intent of the case then I believe in 1977 there might not have been any reason for Washington Plate Glass to even do the work over again at no cost to the company. Those are significant factors because they did it over again, and, therefore, they went to perform a service as opposed to plate glass. I think no one has mentioned it, but that is a very interesting thing that happened. They performed, they remedied a situation which they felt responsible for because their

service was not, remember, it wasn't so much the glass as it was the service, that is, the sealing of the glass, which caused certain discolorations. That goes clearly to what the intent of the parties had in that, and it was clearly intended that a service was to be performed.

Of course, when you look at this contract on a whole, there is no question that the wordings, not only sound, but they read more service than they do of the purchase of goods. Purchase of goods you get a bill of sale as a rule, not always, but you get a bill of sale. Here they have a purchase under, I think, if you look at the contract, it was clearly a contract, Washington Plate Glass Company was submitted a contract as a contractor to perform a job, perform a job.

Now I think there is other significant factors which maybe I should put on the record. Again, in this contract there was

no itemization of how much the prices allowable for labor and how much went to materials in the contract. Although the testimony of Mr. Ruben was that the general practice in the trade was 70 percent materials and 30 percent labor, that is not a part of this contract. It is his statement as to what the practice in the area or in the trade is, but it does not alter in any way whatsoever the full intent of this contract by the parties when they set out all of the services to be performed including the furnishing of the glass, the aluminum, and the store front, which is not in this case too much. But that was all a part of the original contract for the company to perform this service to complete this building. I think when you read, when you look at that, and that's the evidence in this case because that is the contract and that is the testimony of Mr. Ruben, and I think Mr. King's testimony sort of

bolstered this, although I said earlier he was going to do the very same thing Washington Plate Glass was going to do, and right behind him he comes up with what amounts to a service contract as opposed to a purchase of glass. If you look at the contract further there was nothing that gives the Coakley-Williams any say in the purchase price of the glass, only what type of glass you might use, and, I think when you look at the testimony in this case it very clearly shows that the Shatterproof glass was not even the initial glass that was to be used but that some other glass was to be used. However, Mr. Ruben says that the reason they couldn't, and he volunteered this on his own, he wanted to give his reason, not because it was inferior or it was a better glass but simply that the other manufacturers could not furnish the glass in sufficient time to complete the contract on time. So you can see that

when you take all of those things into consideration as far as when you are dealing with the factor, that is the first factor, as to whether or not in the language of the contract, when you take the surrounding facts that goes along with this, I think it is pretty clear that the language of this contract was one for the performance of service.

Now, secondly, the nature of the business. I think also when you look at this contract it is obvious on its face that although the Washington Plate Glass and Shatterproof, as a matter of fact, incidentally in their business might sell glass to somebody, but no witness in this case, on the contrary the witnesses all negate the sale of glass, specifically, the sale of glass alone, because I think they all said that if you supplied them with just the glass they would expect a little more and the contract would not have been

paid. I think the evidence is very clear on that. So you look at the nature of the business and the nature of the business of the people involved in this contract was one with a general contractor, and, Washington Plate Glass was a glass contractor. That is just like a general contractor hiring a plumber contractor, an electrical contractor, in this case a glass contractor, or any other kind of specialized contractor, to perform a service. And the usual custom and trade in the business, unless it is specified in the contract, and it must be specified in the contract, is that the subcontractor as a rule furnishes and uses what materials, brand name, trade name, or whatever materials, as long as it is fit for the job. In this case there was some evidence perhaps that they were going to use Shatterproof Glass but only a certain type of glass, not necessarily that they were going to use gold reflective

glass, which everyone was going to furnish regardless of whether it was going to be Pittsburgh Plate or whatever company.

Now the third aspect of it is the value of the goods. Again, I think I have mentioned that so I can cover all three of the tests. I don't think the Plaintiff has proved not one, I don't know where the evidence is on the value of the goods in this case other than the fact that 70 percent goes to, I think, Mr. Ruben and I want to quote him correctly. I looked at my notes and it says aluminum and glass 70 percent, labor 30 percent. I quoted. I took his direct statement. There is no evidence who made the aluminum. I don't know if Shatterproof did or did not. Washington Plate Glass could have bought the aluminum from some other company, Keyser or one of them. I have no knowledge of that because there was no evidence. But certainly the evidence clearly indicates

that the cost of goods consisted of aluminum and glass. I don't know what part of the aluminum went to the store front or the other parts of the building which we have not even discussed or even brought out in the evidence, but it is obvious that some part of that cost must have gone to the construction of the store front or it would not have been in the contract. I think that is another item which I think the Plaintiff really failed to establish on his case is the true value of the goods. They have an estimated custom of the trade rule of thumb value, which did not establish by any sufficiently, at least for the Court, any clear value of any goods.

That along with the other reasons would indicate that this would be all the more it would be a service contract because in service contracts generally you do not set out any value of the goods. That is a very important item. In a service contract

you give a total figure for service and goods and services to be supplied. Exactly what we have here. This is a standard service contract in the building trade. This is not a new type of contract. It is not an odd type of contract. It is not a fancy contract. It is a standard, and I think the contract itself if I read it correctly says standard contract. It is a printed form that is pretty much universally used in the building contracting business and it is used as a service contract.

The Court thereby concludes it is very obvious that the Plaintiff has not met the burden that is required or even that it was permitted to do by Judge Murnaghan. It fell far short of meeting the burden of proving that this contract in question was one pertaining to the purchase of goods, and, under those circumstances, I have to, I certainly have to conclude and grant the Motion of the Defendant for directed

verdict because this is not a contractual sale, and, therefore, it does not fall under the, I think the evidence convinces me that this is not a contract for sale.

I might add it was very strong that it was not a contract for the sale of goods, it was for the sale of service, and therefore, I have to grant the Motion because if it is for the service, and if you want to sue them for any other breach of contract type of thing you have to have not only privity, but limitations would have long since run. Therefore, it is unnecessary to decide the other issues in this case because my ruling will take care of the issue of limitations, and the issue of damages, and the issue of implied warranties, because the Code says if you don't meet the UCC then you don't, you must meet that test before you meet the test of implied warranties and under the law I think that is pretty obvious.

So I will direct a verdict in favor of the Defendants in this case.